85-2104 (1)

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

GEORGE V. WINTRISS,

Petitioner,

v.

CHRISTEL E. WINTRISS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. Do Federal definitions of military retired pay prevent the States from dividing it in a dissolution of marriage context?

2. Is the retroactive application of the Federal Uniformed Services Former Spouses Protection Act (10 U.S.C. Section 1408, hereafter "FUSFSPA") to military retired pay earned before February 1, 1983, constitutional?

3. Is the "gross" or the "disposable" military retired pay the proper subject of division?

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioner, GEORGE V. WINTRISS, prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One, entered on January 24, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeal, Fourth Appellate District, Division One, State of California, appears at Appendix A. The Order Denying Review of the California Supreme Court appears at Appendix B.

JURISDICTION

The Order Denying Review was entered on March 26, 1986. See Appendix B. This Petition for Certiorari is filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Clauses 13 and 14:

> (13) NAVY. To provide and maintain a Navy.
>
> (14) GOVERNMENT AND REGULATION OF LAND AND NAVAL FORCES. To make Rules for the Government and Regulation of the land and Naval Forces.

Constitution of the United States, Article III, Section 2:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Amendment V.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Petitioner, GEORGE V. WINTRISS (hereinafter "GEORGE"), is a Commander retired from the United States Navy. He has asserted that his military retired pay cannot be divided as community property since dissolution of marriage proceedings commenced between him and respondent, CHRISTEL E. WINTRISS (hereinafter "CHRISTEL"), in January of 1978.

An Interlocutory Judgment of Dissolution of Marriage was entered between GEORGE and CHRISTEL in May of 1980 by the San Diego County Superior Court and in that Judgment the military retired pay of GEORGE was found to be community property; however, that Judgment also reserved jurisdiction to find the military pension to be the separate property of GEORGE in light of later decisional or statutory developments. GEORGE was retired and drawing military retired pay at the time the Interlocutory Judgment was entered.

This Court decided *McCarty v. McCarty* (1981) 453 U.S. 210, on June 26, 1981, and on that same date GEORGE promptly sought a determination in the trial court that the military retired pay was his separate property under the dictates of *McCarty*. Eventually, on January 18, 1983, the trial court determined the military retired pay to be the "personal entitlement" of GEORGE, but on October 19, 1983, at the request of CHRISTEL, the trial court determined that the military retired pay was deferred compensation for past services rendered; that a certain percentage of the "disposable" retired pay, as that phrase is used in FUSFSPA, was community property; and, that GEORGE should pay CHRISTEL $10,413.06 of arrearages as her share of the accrued disposable retired pay through September of 1983.

GEORGE appealed the Order of October 19, 1983, and CHRISTEL appealed the Order of January 18, 1983. The decision of the California Court of Appeal is upon the two consolidated appeals. GEORGE contended, inter alia, that under Federal definitions, military retirement benefits are not property which California can divide; that military retirement benefits are never "vested" or "matured;" and, that Federal preemption deprives California of subject matter jurisdiction over military retirement benefits.

CHRISTEL, conversely, contended that the portion of the January 18, 1983, Order which found the retired pay to be GEORGE'S "personal entitlement" in accordance with *McCarty*

was erroneous, and that she should partake of her percentage of the "gross" and not just the "disposable" retired pay that the trial court awarded her.

The Court of Appeal recited a long list of California decisions which collectively hold that the decision of this Court in *McCarty* no longer exists for any purpose whatever - in effect, that it is now an artifact of legal literature. It quoted the California Supreme Court to the effect that "Starting with the last paragraph of the *McCarty* opinion itself, the judicial and legislative branches, state and federal, cooperated in a massive and largely successful drive to make *McCarty* disappear -- prospectively, presently, and retroactively." *Aloy v. Mash* (1985) 38 Cal.3d 413, 421. The theme that *McCarty* "does not exist" runs through the string of California cases cited in *Aloy v. Mash*.

The Court of Appeal held military retirement benefits to be deferred compensation, and not the personal entitlement of the retiree or present compensation for reduced services. Therefore, the retired pay is divisible since it is not reduced compensation for reduced current services.

GEORGE contended that due process considerations preclude a retroactive application of FUSFSPA so as to deprive him of military retired pay earned before the effective date of FUSFSPA, February 1, 1983. The Court of Appeal ruled that retroactive application of FUSFSPA is justified by the rational legislative purpose of providing economic protection to former spouses of military personnel. The Court was concerned that nonapplication of FUSFSPA retroactively would allow a happenstance of the calendar to determine what happens to military retired pay in dissolutions of marriage, that is, if FUSFSPA were not applied retroactively, retirees whose cases were ended between June 26, 1981, and February 1, 1983, would retain their military retired pay, whereas retirees whose cases were ended after that would have it divided. GEORGE'S contention does not present that dilemma: he contends that retired pay earned prior to the effective

date of FUSFSPA is his personal entitlement in accordance with the holdings of *McCarty* and other Federal authority. The outcome of his case on that argument does not turn on when it came to trial.

The Court of Appeal acknowledged that the California Supreme Court has under consideration two cases which deal with the question of whether the "gross" or "disposable" military retired pay is the proper subject of division. Those cases are *In Re Marriage of Harmon* (1985) 171 Cal.App.3d 438, pet. for rev. granted, November 27, 1985, and *Casas v. Thompson* (1985) 171 Cal.App.3d 481, pet. for rev. granted, November 27, 1985. The Court did not rule directly on the issue, which is purely a question of Federal law, but affirmed the trial court order that divides the disposable retired pay subject to the trial court giving CHRISTEL a share of the gross if that turns out to be the law ultimately.

In sum, the Court of Appeal disagreed with the contentions of GEORGE as to the character of military retired pay and that any due process problems were presented. Its decision recognizes that this Court has yet to rule on some of the issues presented by GEORGE.

GEORGE timely petitioned the California Supreme Court for a review of the Court of Appeal decision, but his Petition was denied on March 26, 1986.

REASONS FOR GRANTING THE WRIT

This Court has not spoken on the subject of military retired pay in a dissolution of marriage context since its decision of *McCarty* on June 26, 1981. In that time, and especially since the effective date of FUSFSPA, February 1, 1983, scores of State court decisions have wrestled with the effects of these two watershed developments. This Petition offers the Court an opportunity to put to rest several of the most significant issues raised by these

developments. Military retirees who raise these issues in State courts, and their present and former spouses, require a definitive ruling.

The trial court originally held the military retired pay of GEORGE to be his personal entitlement, and that is the language used in *McCarty*. The California Court of Appeal said that under California law military retired pay is not a personal entitlement or present compensation for reduced services, but deferred compensation for past services. That holding flies in the face of all Federal decisions that hold military retired pay to be current compensation for reduced but current services, or the personal entitlement of the retiree. A long line of Federal cases from *United States v. Tyler* (1882) 105 U.S. 244, to *McCarty*, so hold. Nevertheless, California does not follow these decisions but rather classifies military retired pay as it wishes.

Federal courts have pointed out many reasons why military retired pay is current compensation for reduced current services. A few of those reasons are as follows:

(a) Retired officers are subject to reductions in pay if they receive certain other employment (5 U.S.C. Section 5532);

(b) Complete forfeiture of pay is required for certain crimes (5 U.S.C. Section 8312);

(c) Employment with defense work for private firms is forbidden within three (3) years of retirement (37 U.S.C. Section 801);

(d) Employment by any foreign government is prohibited (United States Constitution, Article I, Section 9, Clause 8);

(e) The member is subject to recall, without consent, at any time (10 U.S.C. Section 3504(a); 10 U.S.C. Section 672);

(f) Pay is forfeited if foreign citizenship is acquired (an act inconsistent with service to the military of the United States) (37 Comp.Gen. 207 (Navy));

(g) The military member is subject to the Uniform Code of Military Justice (10 U.S.C. Section 802).

Indeed a retired service member may be recalled to active duty and dismissed from the naval service. *Hooper v. United States* (1964) 164 Ct. Cl. 151, 326 F.2d 982, *cert. denied* 377 U.S. 977.

The interpretation of Federal statutes is a Federal question and California is bound by the Federal decisions which characterize military retired pay. *Central Bank v. Superior Court* (1973) 30 Cal.App.3d 962, 967.

Then there is the question of whether FUSFSPA may constitutionally be applied to divide military retired pay benefits earned prior to May 1, 1983. There is a threshold question of whether or not Congress intended FUSFSPA to have any effect whatever on rights earned prior to its effective date. Its Section 1408(c)(1) provides in pertinent part that a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, in accordance with the terms of its jurisdiction. The Act does not deal with the contention that rights earned prior to that date cannot be affected by it; by its own terms it is prospective only. The word "retroactive" never appears in its provisions.

If military retired pay is the "personal entitlement" of the retiree, and if the petitioner earned the entirety of his personal entitlement during the time when such was the state of the law, critical constitutional questions arise if Congress now attempts to change the rule so as to retroactively divest the retiree of his personal entitlement. *McCarty* declared the rights of service members in and to their retired pay to the extent that it was earned prior to February 1, 1983; that was and is the final adjudication of the question. A legislature, even Congress, cannot divest service

members of rights already earned or rights declared to be such by the supreme judicial power. *United States v. Larionoff* (1977) 431 U.S. 864. "It is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough v. Virginia* (1898) 172 U.S. 102, 123-124.

Congress does not have the power to set aside, annul, or override final judgments of the courts of the United States. Such action would offend the doctrine of separation of powers. *Mandel v. Meyers* (1981) 29 Cal.3d 531, 546-548.

The third issue presented by the petitioner involves a direct interpretation of FUSFSPA. The trial court limited the participation of CHRISTEL in the military retired pay of GEORGE to the "disposable retired pay." That phrase comes from the grant of substantive power in the Act to the States in the following language:

> "Subject to the limitations of this section, a court may treat the disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

"Disposable retired or retainer pay" is then defined as the total monthly retired or retainer pay to which a member is entitled less certain deductions primary among which are amounts "properly withheld for Federal, State, or local income tax purposes," or for an annuity under the Survivor Benefit Plan. Section 1408(a)(4)(C)(F).

The enforcement section of the Act, found at 1408(D)(1), speaks to how the secretary of the concerned service shall make payment of the disposable retired or retainer pay as provided in certain court orders. In other words, the substantive sections of the Act

which grant power to the States and the enforcement section all refer to "disposable" retired or retainer pay. There is no grant of power to the States to divide gross military retired pay.

Senator Roger W. Jepsen, Chairman of the Committee on Armed Services, Subcommittee on Manpower and Personnel, and sponsor of the FUSFSPA Bill, said in a statement to the Subcommittee on February 10, 1982, with reference to the Act:

> "It recognizes certain Federal interests in military retired pay and guarantees that a substantial portion cannot be touched by State courts." (Page 98, Hearings before the Subcommittee on Manpower and Personnel of the Committee on Armed Services, United States Senate).

Nevertheless, some State courts treat FUSFSPA as if it were only a garnishment statute wherein the Federal government consents that the States may do as they wish with military retired pay and the only limitations in the Act pertain to what the federal government will enforce. Thus, one California Court of Appeal claims the right to divide disability retired pay as community property in spite of the express limitation against such action contained in Section 1408(a)(4). *In Re Marriage of Stier* (1986) 178 Cal.App.3d 42. Another California Court of Appeal holds that the limitations on division in the Act are substantive and limit the State to a division of the disposable retired pay. *In Re Marriage of Costo* (1984) 156 Cal.App.3d 781.

Two cases under consideration by the California Supreme Court have come to conflicting views of whether it is the gross or the disposable military retired pay that is divided. *In Re Marriage of Harmon* (1985) 171 Cal.App.3d 438; *Casas v. Thompson* (1985) 171 Cal.App.3d 458.

CONCLUSION

Resolution of the conflict between the power FUSFSPA appears to grant and other Federal definitions of military retired pay can only be made by this Court. Similarly, the extent to which FUSFSPA can affect rights to military retired pay earned prior to its effective date can only be decided by this Court. Finally, this Court is the ultimate forum to interpret the language of FUSFSPA and say whether its limitations are substantive or procedural, *i.e.*, do they hand the States a "blank check" as most California cases argue, or do they contain substantive protections for the retiree. The California Court of Appeal decision below cites a dozen post-*McCarty* California cases which interpret the effect of *McCarty* or FUSFSPA and each of them is a State attempt to interpret Federal law upon which this Court has the final decision. The petitioner served his country honorably in a period when Federal statute and caselaw interpretation said his retired pay would be his; he has fought for eight years in the California courts to vindicate his position and has finally lost in those courts; this Court is the last forum which may help him, and the issues he raises affect thousands of retirees and their former and present spouses and are of national significance.

DATED: June 23, 1986

Respectfully submitted,

JOHN KNOLL

Attorney for Petitioner

APPENDICES

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of GEORGE V. and CHRISTEL WINTRISS	
GEORGE V. WINTRISS, Appellant, v. CHRISTEL E. WINTRISS, Cross-Appellant.	D000730 4 Civ. No. 28657 & 31462 (Super. Ct. No. D123317)

APPEAL from an order of the Superior Court of San Diego County, Alfred E. Lord, Judge. Reversed in part and affirmed in part.

George V. Wintriss (George) and Christel E. Wintriss (Christel) appeal from two post-judgment orders concerning characterization and division of George's military retirement pay following the 1980 dissolution of their sixteen-year marriage. At the time of divorce, George was a retired Navy officer receiving monthly military retirement benefits. The parties are all too familiar with the lengthy procedural history of the case which brings them before this court for the third time in four years. We simply highlight the pertinent factual and procedural details.

Pursuant to the May 5, 1980 interlocutory judgment of dissolution, the court calculated a 61.71904 percent community property interest in the military retirement benefits and ordered George to pay Christel her one-half share by allotment commencing April 1, 1980. It also retained jurisdiction over the military pension "to divide or find [it] to be the separate property of one or the other party in light of later decisional or statutory law." Neither party appealed the interlocutory judgment.

On June 26, 1981, the date of the United States Supreme Court decision in *McCarty v. McCarty* (1981) 453 U.S. 210, George moved for modification of the interlocutory judgment and award of the military pension as his separate property. He also requested reimbursement of the $14,839.04 already paid to Christel. The trial court found the interlocutory judgment's reservation of jurisdiction void and declined to entertain George's motion. This court granted George's petition for writ of mandate in May 1982 and directed the trial court to conduct further proceedings for the purpose of characterizing the military retirement benefits. (*Wintriss v. Superior Court*, 4 Civ. 26537, opinion dated May 19, 1982.)

On January 18, 1983, the court ruled the military retirement was George's personal entitlement and separate property under *McCarty*. It denied George's request for reimbursement as inequitable. In addition, the court ordered jurisdiction reserved over disposition and distribution of the military pension. The reservation of jurisdiction included, but was not limited to, orders permitted by the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA, 10 U.S.C., § 1408.)

George appealed the provisions of the January order which denied his request for reimbursement and reserved jurisdiction over the military retirement, child support and attorney's fees.[1]

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[1]George expressly abandons appeal of the portion of the January order reserving jurisdiction over disposition of his military retirement pay. He does not brief the remaining issues in the January appeal -- denial of his request for reimburse-

Christel cross-appealed the portion of the January order which characterized the military retirement benefits as George's personal entitlement.

While appeal of the January order was pending, Christel filed an order to show cause on February 28, 1983, seeking implementation of FUSFSPA. George petitioned this court for a writ of prohibition restraining the trial court from proceeding with Christel's order to show cause until the appeal and cross-appeal from the January order was decided. On May 6, 1983, this court denied the petition as premature and stated:

> ". . . we remind counsel that *In re Marriage of Buikema*, 139 Cal.App.3d 689; *In re Marriage of Frederick* (filed Apr. 3, 1983) 83 D.A.R. 1003 (Apr. 25, 1983); and *In re Marriage of Hopkins* (filed Apr. 26, 1983) 83 D.A.R. 1150 (May 3, 1983) have found the Uniformed Services Former Spouses' Protection Act to be completely retroactive. In cases which are not completely final, application of *McCarty* at any stage of the proceedings is improper." (*Wintriss v. Superior court*, 4 Civ. 28900, opinion dated May 6, 1983.)

Ignoring the admonition George renewed with the trial court his contention *McCarty* required the military retirement benefits be characterized as separate property. By order entered on October 19, 1983, the court recharacterized George's military retirement and ordered George to pay Christel a sum equal to one-half of 61.71904 percent of his disposable retirement pay pursuant to FUSFSPA. Christel was also awarded $10,413.06 in arrearages.

George appeals the October order and Christel cross-appeals the portion of the October order limiting her award to a share of the

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ment by Christel and reservation of jurisdiction over child support and attorney's fees. We therefore deem George's appeal abandoned as to the entire January order. (*In re Marriage of Shanahan* (1979) 95 Cal.App.3d 295, 297, fn.1.)

disposable military retirement pay. By stipulation, the appeals and cross-appeals are consolidated.

For the reasons set out below, we reverse and affirm the orders to reach the following disposition: the portion of the January 18, 1983 order finding George's military retirement pay to be a "personal entitlement" in accordance with *McCarty* is reversed; the portion of the October 19, 1983, order providing for payment to Christel of one-half of 61.71904 percent of George's disposable retired pay is affirmed subject to the qualification discussed in the opinion; the portion of the October order providing for payment of arrearages based on disposable retired pay is affirmed subject to the same qualifications; the October order is affirmed in all other respects; the case is remanded for determination of attorney's fees on appeal; and the request for sanctions is denied.

DISCUSSION

I

Christel's cross-appeal of the January order and George's appeal of one portion of the October order present identical issues: whether military retirement benefits are a personal entitlement and separate property or deferred compensation for past services subject to division on dissolution. In spite of the flurry of post-*McCarty* and post-FUSFSPA judicial activity on every relevant aspect of the characterization of military retirement benefits, George remains unconvinced that Christel is entitled to her community share of vested and matured military retirement benefits over which the trial court retained jurisdiction. George contends he is entitled to the military pension as his separate property because: (1) military retirement benefits are not property California can divide under federal definitions; (2) FUSFSPA compels California to follow its own laws pertaining to division but not characterization of military pensions; (3) Civil Code section 5118 precludes division of military retirement benefits because they are

not property; (4) military retirement benefits are never vested or matured; (5) California courts lack subject matter jurisdiction to affect division of military retirement benefits because they are not property; (6) federal pre-emption voids conflicting state judgments entered before McCarty; and (7) federal pre-emption deprives California of subject matter jurisdiction over military retirement benefits. In reversing a portion of the January order and affirming a portion of the October order, we cite briefly the authorities which negate George's lengthy argument.

California law is clear that retirement benefits earned by a spouse during marriage are community property subject to equal division between the spouses upon dissolution. (*In re Marriage of Brown* (1976) 15 Cal.3d. 838, 842; *In re Marriage of Stephenson* (1984) 162 Cal.App.3d 1057, 1081.) The principle that retirement benefits are community property applies regardless of the source of the retirement fund: state, federal, military or private employment. (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596.) ". . . [M]ilitary retirement pay must be realistically viewed as compensation for past, not present, services." (*Id.*, at p. 604.)

In *McCarty v. McCarty, supra*, 453 U.S. 210 the United States Supreme Court characterized military nondisability retirement pay as a personal entitlement and concluded federal law precluded state courts from dividing military pensions pursuant to state community property laws. (*Id.*, at pp. 226, 232-236.) *McCarty* was short-lived. On September 8, 1982, Congress passed FUSFSPA. "Starting with the last paragraph of the *McCarty* opinion itself, the judicial and legislative branches, state and federal, cooperated in a massive and largely successful drive to make *McCarty* disappear -- prospectively, presently, and retroactively." (*Aloy v. Mash* (1985) 38 Cal.3d 413, 421; see *In re Marriage of Mastropaolo* (1985) 166 Cal.App.3d 953, 960; *In re Marriage of Fairfull* (1984) 161 Cal.App.3d 532, 534-536; *In re Marriage of Lockstrom* (1983) 148 Cal.App.3d 675; *In re Marriage of Sarles* (1983) 143 Cal.App.3d 24, 26-30; *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 833, 836-837; *In re Marriage of Fransen*

(1983) 142 Cal.App.3d 419, 427; *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, 353-361; *In re Marriage of Frederick* (1983) 141 Cal.App.3d 876, 879-880; *In re Marriage of Buikema* (1983) 139 Cal.App.3d 689, 691.) There was no need to be concerned with *McCarty* since FUSFSPA evidenced a legislative intent that military retirement could be treated "as though *McCarty* did not exist." (*In re Marriage of Ankenman, supra*, 142 Cal.App.3d at p. 837; *In re Marriage of Frederick, supra*, 141 Cal.App.3d at p. 879.) Nor did the *McCarty* decision "divest state courts of [subject matter] jurisdiction . . . nor render earlier state actions void." (*In re Marriage of Thomas* (1984) 156 Cal.App.3d 631, 637.) Furthermore, *McCarty* had not overruled *Fithian's* characterization of military retirement pay as deferred compensation. (See *McCarty v. McCarty, supra*, 453, U.S. at p. 223.)

George acknowledges FUSFSPA directs California to follow its own law. As stated in 10 U.S.C. section 1408, subdivision (c)(1):

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse *in accordance with the law of the jurisdiction of such court.* (Emphasis supplied.)

That family law matters are the special province of the state courts has long been recognized. (See *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 581; *United States v. Yazell* (1966) 382 U.S. 341, 352; *Ex Parte Burrus* (1890) 136 U.S. 586, 593-594.) State law may determine treatment accorded federally-created property rights such as military retirement benefits so long as the result does not frustrate the express or implied purposes of the federal legislation. (*In re Marriage of Fithian, supra*, 10 Cal.3d 592, 597, fn. 4; *In re Marriage of Hopkins, supra*, 142 Cal.App.3d 350, 359, fn. 17; see, *Free v. Bland* (1962) 369 U.S. 663, 666, 668-670; *Wissner v. Wissner* (1950) 338 U.S. 655, 656, 658-660.)

Recognizing FUSFSPA's clear directive, California courts routinely divide nondisability military retirement benefits in accordance with Civil Code sections 4800 and 4803. Because military retirement benefits are defined as deferred compensation, not personal entitlement or present compensation for reduced services, Civil Code section 5118 is inapplicable. Furthermore, we cannot agree with George's contention the military retirement benefits were neither vested nor matured. (See *In re Marriage of Brown, supra*, 15 Cal.3d at p. 842.)

II

George also challenges the October order on grounds due process precludes FUSFSPA's retroactive application to reverse *McCarty* and deprive him of military retirement benefits earned before FUSFSPA's February 1, 1983 effective date.

In re Marriage of Hopkins, supra, 142 Cal.App.3d at p. 360 holds FUSFSPA is retroactive to the date of the *McCarty* decision and applicable to all cases not final as of the effective date of the Act. "The prior decision of this state relative to the treatment of military pensions as community property, as more fully set out in *Fithian, Brown,* et al., will be controlling on all cases not yet final, whether they were filed before, on or after June 26, 1981." (*Id.*, at p. 360.) Accordingly, California courts have applied FUSFSPA to military retirement benefits earned before February 1, 1983, in cases not final at the time the Act was passed. (See *In re Marriage of Fairfull, supra*, 161 Cal.App.3d 532; *In re Marriage of Lockstrom, supra*, 148 Cal.App.3d 675; *In re Marriage of Sarles, supra*, 143 Cal.App.3d 24; *In re Marriage of Ankenman, supra*, 142 Cal.App.3d 833; *In re Marriage of Fransen, supra*, 142 Cal.App.3d 419; *In re Marriage of Hopkins, supra*, 142 Cal.App.3d 350; *In re Marriage of Frederick, supra*, 141 Cal.App.3d 876; *In re Marriage of Buikema, supra*, 139 Cal.App.3d 689.)

In *In re Marriage of Fairfull, supra*, 161 Cal.App.3d 532, 535-536, the court found no violation of due process in applying FUSFSPA retroactively to military retirement pay rights which accrued before its effective date. (See also *In re Marriage of Ankenman, supra*, 142 Cal.App.3d at pp. 837-838.) The constitutional guaranty of substantive due process requires only that the law in question not be unreasonable, arbitrary or capricious, and that it have a real and substantial relation to the object sought to be obtained. (*Interstate Marina Development Co. v. County of Los Angeles* (1984) 155 Cal.App.3d 435, 450; *Battle v. Kessler* (1983) 149 Cal.App.3d 853, 861, fn. 3.) Here the retroactive application of FUSFSPA is justified by the rational legislative purpose of providing economic protection to former spouses of military personnel.

> "The question as to whether retroactive application of the Act could produce substantial inequitable results is the easiest to answer -- the *nonapplication* of the Act would produce inequitable results.
>
> "....
>
> ". . . [I]t would allow the happenstance of the calendar to thwart the meaning of Congress when the Congress did quickly and affirmatively act to clearly and fully make these pension rights subject to the state's control. Indeed, not to apply the Act retroactively would be to thwart the very title of the Act, the "Uniformed Services Former Spouses' Protection Act." (*In re Marriage of Hopkins, supra*, 142 Cal.App.3d at pp. 359-360.)

III

Christel argues the trial court erred in ruling her interest in arrearages and future payments should be computed on George's disposable rather than gross military retirement benefits. This issue was recently examined in two cases which reached opposite results. Petitions for review in each case have been granted by the California Supreme Court (*In re Marriage of Harmon* (1985) 171 Cal.App.3d 438, petn. for rev. granted, Nov. 27, 1985 and *Casas v. Thompson* (1985) 171 Cal.App.3d 458, petn. for rev. granted, Nov. 27, 1985.) Because of the uncertainty associated with the present state of the law we believe the fairest way to deal with this issue is to affirm the order awarding Christel her community interest in George's disposable retirement pay subject to George setting aside Christel's potential share in the difference between the gross and disposable retirement pay in such manner as the parties may agree or as the court shall direct to assure that Christel will not be deprived of her community interest in that property if the California Supreme Court should decide this issue in her favor. We defer to the trial court to fashion the proper method to assure that neither party is denied his or her interest in the property during this window period in which the law remains unsettled. The commencement date for such computation shall be the same commencement date of the arrearage due Christel as previously determined by the court.

IV

Christel requests an award of attorney's fees for services rendered on appeal. The parties agree the trial court can better determine the extent of Christel's need and George's ability to pay attorney's fees. We remand to allow the superior court to rule on Christel's request. (*In re Marriage of Buikema, supra*, 139 Cal.App.3d at. p. 691.)

V

We deny Christel's request for sanctions. *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 articulates the standard for imposition of sanctions for frivolous appeals. ". . . [A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Id.*, at p. 650.) "An appeal that is simply without merit is *not* by definition frivolous . . . ." (*Ibid*; emphasis in original.)

George devotes the substantial portion of his appeal to contentions refuted by clear California authority. Arguably, the California Supreme Court and United States Supreme Court have yet to rule on some of the issues George presents. For this reason we are unable to conclude the appeal "indisputably has no merit." (*In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 650.)

DISPOSITION

Orders reversed in part and affirmed in part. This case is remanded for further proceedings consistent with the views expressed.

WIENER, J.

WE CONCUR:

KREMER, P.J.

KINTNER, J.*

*Assigned by the Chairperson of the Judicial Council.

SUPREME COURT
FILED
MAR 26 1986
Laurence P. Gill, Clerk
DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D000730

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF WINTRISS

WINTRISS

v.

WINTRISS

Appellant's petition for review DENIED.

BIRD

Chief Justice

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE V. WINTRISS, Petitioner,) No. _____
)
vs.) CERTIFICATE OF SERVICE
) BY MAIL
CHRISTEL E. WINTRISS, Respondent.)
)

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I, JOAN E. HACECKY, am a citizen of the United States and a resident of the County of San Diego. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2366 Front Street, San Diego, CA., 92101-1484. On June 20, 1986, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, on the interested parties in said action, by placing a true copy there-

of in a sealed envelope with postage thereon fully prepaid, in the United States post office mail at San Diego, CA., addressed as follows:

Clerk (40 copies)
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Clerk (3 copies)
California Supreme Court
3580 Wilshire Blvd.
Room 213
Los Angeles, CA. 90010

Gerald L. Barry, Jr. (3 copies)
Mitchell, Ashworth, Keeney,
Barry & Pike
520 West Ash Street, Suite 200
San Diego, CA. 92101

Clerk (3 copies)
Court of Appeal
Fourth Appellate District
Division One
1350 Front Street
Room 6010
San Diego, CA. 92101

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 20, 1986, at San Diego, CA.

Joan E. Hacecky

JOAN E. HACECKY